Supreme Court, U.S.
FILED

No. _____ (1)

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In The
Supreme Court of the United States

HAWTHORNE LAND COMPANY;
HUGH A. HAWTHORNE FAMILY CLASS TRUST,
BANK ONE TRUST COMPANY, N.A.,

Petitioners,

versus

OCCIDENTAL CHEMICAL CORPORATION;
TEXAS BRINE COMPANY, L.L.C., Successor in Interest to Texas Brine Corporation; PAUL LANE, doing business as Paul Lane's Construction Company;
MARSH BUGGAGE EQUIPMENT COMPANY;
WOODSON CONSTRUCTION COMPANY;
TASSIN INTERNATIONAL LIMITED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

VICTOR L. MARCELLO
Counsel of Record
TALBOT, CARMOUCHE & MARCELLO
214 W. Cornerview
P.O. Box 759
Gonzales, LA 70707-0759
Telephone: 225-644-7777
Fax: 225-644-5226
Attorney for Petitioners, Hawthorne Land Company; Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Are all co-owners of a parcel of real property indispensable or necessary parties to a suit for contamination of that property under FRCP Rule 19?

2. When equally plausible, but competing, inferences can be drawn from the same evidence, is it legal error to grant summary judgment?

3. Can a summary judgment be based on an affidavit that directly conflicts with another affidavit from the same affiant?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed are:

Hawthorne Land Company, Petitioner
Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Petitioner
Occidental Chemical Corporation, Respondent
Texas Brine Company, L.L.C., Successor in interest to Texas Brine Corporation, Respondent
Paul Lane, d/b/a Paul Lane's Construction Company, Respondent
Marsh Buggage Equipment Company, Respondent
Woodson Construction Company, Respondent
Tassin International Limited, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioners Hawthorne Land Company and Hawthorne Trust (Bank One Trust Company as trustee) respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit upholding federal jurisdiction and dismissing the captioned matter on grounds of prescription.

OPINIONS BELOW

Hawthorne Land Company; Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Plaintiffs-Appellants v. Occidental Chemical Corporation; et al., Defendants, Occidental Chemical Corporation; Texas Brine Company, LLC, Successor in Interest to Texas Brine Corporation; Paul Lane, d/b/a Paul Lane's Construction Company; Marsh Buggage Equipment Company; Woodson Construction Company; Tassin International Limited, Defendants-Appellees, 431 F.3d 221 (5th Cir. 2005), App. 1.

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Hearing on Motions, Ruling, entered May 4, 2002, App. 5, reported at 2002 WL 1066752 (E.D.La.).

JURISDICTIONAL STATEMENT

The United States Fifth Circuit issued its opinion in this matter on November 15, 2005. App. 1. A timely application for panel rehearing was denied on January 26, 2006. App. 2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 19(a) and (b):

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and

joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Federal Rules of Civil Procedure 56(e):

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

In 1965, property owner Hugh Hawthorne conveyed a servitude to defendant Texas Brine Company L.L.C. ("Texas Brine") so that it could construct, operate, and maintain a pipeline. The pipeline was later transferred to defendant Occidental Chemical Corporation ("Occidental"), but Texas Brine continued to operate it. The pipeline is used to transport highly concentrated sodium chloride solution, or brine. At the time suit was filed, the plaintiffs Hawthorne Land Company ("Hawthorne Land") and Hawthorne Trust (Bank One Trust Company as trustee) held an undivided ninety-five percent ownership interest in the property over which Hugh Hawthorne had granted the servitude. The other five percent was held by Nire, Inc. ("Nire").

The pipeline experienced seven leaks from 1985 to 1987. A subsequent site assessment showed that the leaks caused extensive contamination on the property. In February, 2001, Hawthorne Land filed suit against eight defendants in state court in St. James Parish, Louisiana for property damages arising out of the leaks. Six of the eight original defendants were Louisiana citizens. Occidental and Texas Brine (the two non-Louisiana defendants) removed the case to the Eastern District of Louisiana on the basis of diversity removal jurisdiction, claiming that the non-diverse defendants were improperly joined. Occidental and Texas Brine also answered the complaint

with various defenses, including the failure of Hawthorne Land to join all co-owners of its property as plaintiffs.

After being served with this answer, Hawthorne Land contacted its co-owners Hawthorne Trust and Nire to request that they join in the action. Hawthorne Trust agreed to join, but Nire refused. Plaintiff filed a motion for leave to amend its complaint to join co-owner Hawthorne Trust as co-plaintiff, and also filed a motion to remand. The court granted leave to Hawthorne Land to amend its complaint. Finding the non-diverse defendants to be improperly joined, the district court denied remand.

Having exhausted their efforts to convince Nire to join in the action, plaintiffs Hawthorne Land and Hawthorne Trust filed a motion to amend the complaint to join Nire as a defendant or involuntary plaintiff. The joinder of Nire would have destroyed diversity, thus requiring remand. Shortly after plaintiffs' motion to amend the complaint was filed, defendants settled with Nire. The district court found that the motion to amend should be denied because Nire had settled.

Later in the litigation plaintiffs again moved to join Nire as a defendant, arguing that defendants were using the co-operation clause of the Nire settlement to manipulate the evidence by arguing that the proposed excavation remedy offered by plaintiffs' remediation expert could not be accomplished without consent of Nire, and that Nire had not consented to this remedy. In their second attempt to join Nire, plaintiffs also argued that they had a valid case of action against Nire, as co-owner, under Louisiana law. Plaintiffs' second attempt to join Nire as a party was denied.

After extensive discovery, defendants filed a motion for summary judgment on the basis of prescription, and the motion was granted. The district court found that the claims of plaintiffs had prescribed. The Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW COMMITTED ERROR IN FAILING TO FIND THAT A CO-OWNER OF PROPERTY IS AN INDISPENSABLE OR NECESSARY PARTY TO A SUIT FOR CONTAMINATION OF THAT PROPERTY

The property at issue is owned by Hawthorne Land, Hawthorne Trust, and Nire. Nire owns a five percent undivided interest. When Occidental and Texas Brine answered the complaint of Hawthorne Land, they raised as a defense the failure of plaintiff to join the co-owners of its property as plaintiffs. For example, Texas Brine specifically alleged that "[t]he non-joinder of the co-owners will subject the defendants to the risk of multiple judgments, inconsistent judgments and a waste of judicial resources."

After service of the answers to the complaint, Hawthorne Land contacted its co-owners requesting that they join in the action. Hawthorne Trust agreed, but Nire refused. Hawthorne Land was granted leave to amend its complaint to join co-owner Hawthorne Trust. After exhausting their efforts to convince Nire to join, the plaintiffs (now Hawthorne Land and Hawthorne Trust) then sought leave to file an amending complaint seeking to join Nire as a involuntary plaintiff or defendant. This proposed complaint alleged that Nire was a Louisiana corporation

with its principal place of business in Texas. Diversity would be destroyed if Nire was added either as an involuntary plaintiff or a direct defendant. Texas Brine immediately moved for a continuance of the motion to amend seeking discovery on the jurisdictional facts pertaining to Nire's citizenship. These motions were unopposed. Less than eight weeks later, Texas Brine and Occidental, seeking to manipulate the district court's jurisdiction, settled with Nire for forty thousand dollars.

The Nire settlement released defendants from all liability, and also stated: "Releasors . . . shall not voluntarily advise, encourage or assist any other individuals to file a complaint or otherwise prosecute litigation against Releasees in any forum." Further, "Releasors . . . will cooperate fully with Releasees . . . including assisting Releasees and obtaining the necessary access to any property."

By agreeing to these terms, Nire aligned itself with the defendants in this litigation. Nire released all claims it had as co-owner, including any claims it may have had for assessment and analysis of the extent and nature of the contamination of the property. Thus, any such assessment and analysis had to be funded by Hawthorne Land and Hawthorne Trust, absent some means of obtaining reimbursement from Nire.

After the Nire Settlement, Occidental and Texas Brine filed oppositions to the motion for leave to file an amending complaint adding Nire, arguing that joinder was not required because of the settlement. The magistrate judge denied leave to file the amending complaint on the basis of the settlement. App. 5. This ruling was affirmed by the district judge.

Louisiana Civil Code article 806 provides: "A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their share." In this action, plaintiffs seek general and punitive damages, including "assessment and property restoration costs associated with pipeline leaks" alleged to have been caused by the defendants. Plaintiffs seek sufficient damages to "conduct a complete scientific analysis of the extent and nature of contamination" on the subject property, restoration of the property "to its pre-polluted state," stigma damages, lost profits, reasonable attorneys fees, litigation expenses, and other additional elements of damage.

In her written reasons denying leave to join Nire, the Magistrate Judge found that: (1) "Hawthorne's ground for requiring Nire's joinder was eliminated by the settlement"; (2) "The most that Hawthorne can recover from Texas Brine and Occidental under any circumstances is 95% of the damages. There can be no shortfall between its recovery and its share of the damages"; and, (3) La. Civ. Code art. 806 does not apply unless expenses are "incurred," and plaintiffs incurred no expenses. App. 5, pp. 4-5.

Under La. Civil Code article 806, plaintiffs as co-owners have the right to incur expenses with regard to the assessment of the nature and extent of the contamination, and further have the right to seek reimbursement against Nire for such expenses. In addition, under Louisiana law, plaintiffs have the right to seek declaratory relief against Nire regarding Nire's obligation to pay its proportionate share of such expenses. *Miller v. Seven C's Properties, LLC*, 800 So.2d 406 (La. App. 3d Cir. 2001). In *Miller*,

the Court found that plaintiff could proceed against his co-owner for a declaratory judgment establishing his right to seek reimbursement for the expense of repairs to various levees surrounding jointly held real property.

As a result of the Nire Settlement, complete relief *could not* be accorded among the remaining parties to this action (i.e., Hawthorne Land, Hawthorne Trust, Texas Brine, and Occidental. *See* FRCP Rule 19). For example, if it was determined that the cost of repairing the damages sustained is such that Nire's proportionate share exceeded the amount it obtained in settlement, Nire would be required to make up the difference. Because of the Nire Settlement, the present plaintiffs could not obtain judgment against Occidental and Texas Brine for the shortfall. Thus, the only means available for plaintiffs to realize a complete evaluation, clean up, and remediation of their property was to allow them to proceed against Nire as a direct defendant. Further, as a direct result of the co-operation clause of Nire Settlement, plaintiffs were forced to undergo additional costs and expenses to establish their claims in this action.

After denial of remand, plaintiffs performed an extensive environmental investigation which found that excavation was required to properly remediate the property. Defendants opposed this remediation plan, arguing not only that excavation was unnecessary, but also that Louisiana law did not allow plaintiffs to undertake their remediation plan without Nire's consent. But defendants had already purchased the right to veto plaintiffs' remediation plan by inserting a co-operation clause in the Nire Settlement. In other words, defendants sought to employ the co-operation clause of the Nire Settlement not as a

shield, but as a sword pointed at minimizing any eventual judgment for remediation.

The case *sub judice* was eventually dismissed on a summary judgment based on prescription. However, had the lack of Nire's consent to plaintiffs' remediation plan caused an inadequate award for remediation in a trial on the merits, Nire could have, if joined as a defendant, been held liable under the provisions of La. Civ. Code art. 799 for the diminished value of plaintiffs' recovery of remediation costs. Under article 799, "one co-owner will be liable to the others for causing damage to the common property. This principle is inherent in the Civil Code under article 2315 and is grounded in the civilian doctrine of *negotiorum gestio*, a species of agency." Gravois, *The Revision of Louisiana Co-Ownership Law*, 65 Tul. L. Rev. 1261, 1271 (May 1991). Those acts implicated in the doctrine of *negotiorum gestio* include both material acts and *juridical acts such as the settlement between Nire and defendants. See Johnco, Inc. v. Jameson Interests,* 741 So.2d 867, 870 (La. App. 3d Cir. 1999). A co-owner such as Nire that acts in its own interest and "contrary to the actual or presumed intention" of other co-owners "may incur liability under the law of delictual obligations." *Johnco, Inc. v. Jameson Interests*, 741 So.2d 867, 870 (La. App. 3d Cir. 1999); La. C.C. art. 2315. Nire received money in exchange for agreeing to participate in a scheme to limit the recovery of funds for the cleanup of the property it holds in indivision with plaintiffs. Nire was paid by defendants to perform acts contrary to the interests of its co-owners and contrary to its legal obligations as a co-owner.

Discussing the general rule applied in federal courts, Wright and Miller explain that "in order to sue for damages for injury to the land or to sue for partition, all cotenants must be before the court in order that each may

claim his share. Otherwise a multiplicity of suits or inconsistent determinations may result." Wright & Miller, 7 Fed. Prac. & Proc. Civ. 3d § 1621. In *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968), the plaintiff sued to have a pipeline removed from his property. Finding that Rule 19 required joinder of a Texas co-owner who held a one-sixth interest in the property, the Fifth Circuit described two controlling factors: "the inability of the federal district court to finalize the litigation or to effectively adjudicate the rights of all concerned parties," and "the availability of adequate relief in the Louisiana state court" *Id.* at 888. The Fifth Circuit also found that the "cause of action involved in this litigation could easily be brought in a state court of Louisiana," particularly since "the suit involves activity on real property in which the State of Louisiana, rather than the federal judiciary, has a fundamental concern." *Id.* at 889. *See also Read v. Phillips Petroleum Co.*, 441 F.Supp. 1184, 1185 (D.C.La. 1977) (Rubin, J.).

The facts of this case present an identical situation. Twice refusing to allow the joinder of Nire, the district court deprived itself of the means to "finalize this litigation or effectively adjudicate the rights of all concerned parties" (quoting *Broussard*, *supra*, at 888-889) by placing the plaintiffs in the position of having to file a "lawsuit [in state court against Nire] on essentially the same subject matter." Rule 19 is specifically intended to avoid such a result. Adequate relief could be accorded all parties in a Louisiana forum.

Under Louisiana law, plaintiffs have claims against Nire for both money damages and declaratory relief. Plaintiffs incurred expenses for evaluation of the extent of the brine contamination and the development of a remediation

plan; plaintiffs were entitled to declaratory relief regarding Nire's share of future expenses and remediation costs; and plaintiffs were entitled to damages from Nire resulting from any diminution of their recovery incurred as a result of Nire's agreement to cooperate with Texas Brine and Occidental. The settlement between Nire and the defendants deprived plaintiffs of the unanimous consent needed to establish their rights to full remediation costs, including excavation, at trial.

The courts below should have analyzed the factors set forth in Rule 19(b) and concluded that a judgment rendered in Nire's absence would be highly prejudicial to plaintiffs. First, it would be impossible to insert any workable protective provision in such a judgment to lessen or avoid the prejudice to plaintiffs. Second, as the courts below acknowledge, plaintiffs in the present action cannot obtain a judgment against the polluters for more than ninety five percent of their remediation damages, thus causing a shortfall in the funds necessary to accomplish the remediation. Third, the failure to allow joinder of Nire deprived the plaintiffs of an adequate remedy against Nire in state court. The cost of pursuing Nire alone in state court is prohibitive. Further, Nire is not a polluter, thus making it less likely that a jury would find the same quantum of damages that would be awarded in a suit where the polluters are Nire's co-defendants.

All of the requirements of Rule 19(b) are met. The district court abused its discretion in failing to find that Nire was an indispensable party under Rule 19(b). The district court also abused its discretion in failing to join Nire as a defendant or involuntary plaintiff under Rule 19(a). The requisites of Rule 19(a) were pled by the defendants in their answers to the original complaint. When

defendants realized that the joinder of all co-owners would result in remand to state court, defendants quickly changed their position on the matter.

II. WHEN EQUALLY PLAUSIBLE, BUT COMPETING, INFERENCES CAN BE DRAWN FROM THE SAME EVIDENCE, THE GRANT OF SUMMARY JUDGMENT IS LEGAL ERROR

The district court granted summary judgment dismissing this action in its entirety on prescription. The Fifth Circuit reviewed *de novo* and affirmed.

Plaintiffs brought claims against defendants in tort and contract. In Louisiana, tort prescription is one year for land damage and ten years for breach of contract, running from the date of the breach. Both prescriptive statutes apply the discovery rule. Tort claims begin to prescribe when the victim knows or should know of the damage; contract claims begin to prescribe when the plaintiff knows or should know of the breach.

The opinion of the Fifth Circuit exhibits deep confusion about the basic facts pertaining to prescription. The gravamen of the Fifth Court's prescription analysis is that plaintiffs acquired constructive knowledge of their cause of action regarding the leaks sued upon when the pipeline was replaced because they "should have known why the pipeline was replaced – because it had *the leaks at issue*." App. 1, 431 F.3d at 229. But there is absolutely no evidence in the record – and neither the defendants nor the courts below cite any – that the plaintiffs had knowledge that the replacement of the pipeline was related to the "leaks at issue."

The Fifth Circuit's inferences from the facts it finds to be uncontested are unjustified. The Fifth Circuit states: "Although plaintiffs argue that LeBlanc and Hawthorne Land never knew about the leaks at issue, at the very least they should have known that the pipeline was replaced for a reason – brine leaks caused by erosion." App. 1, 431 F.3d at 229-230. It is equally plausible to view this very same evidence – i.e., replacement of the pipeline – as indicative of the prudence and diligence of defendants in acting to prevent leaks by the conduct of preventative maintenance and repair. In fact, this view of the pipeline's replacement was explicitly endorsed by defendants' representative Dan Hall, who refers to the replacement as "maintenance" in a letter intended specifically to deflect any suggestion that pipeline replacement might be associated with faulty operation.

In an analogous quotidian context, no one would seriously argue that the knowledge that John Q. Smith replaced a tire on his automobile is irrefutable proof that the tire had a leak or had blown out. An equally plausible inference from the same fact is that John Q. Smith is a prudent auto owner and replaces his tires before they leak or blow out.

It is beyond question that in the determination of a Rule 56 motion, the "inferences to be drawn from the evidence must be viewed in the light most favorable to the *nonmoving* party."[1] This Court has emphasized that "[s]ummary judgment in favor of the party with the burden

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[1] *Terrebonne Parish School Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002), citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L. Ed.2d 176 (1962), and *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999) at footnote 7.

of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations *or inferences* by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S.Ct. 1545, 1552 (1999) (emphasis added). Where competing factual inferences are equally plausible, summary judgment is inappropriate. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 857 (9th Cir. 1995). In upholding the district court's grant of summary judgment on prescription, the Fifth Circuit committed legal error by viewing the inferences to be drawn from the fact of replacement of the pipeline in the light most favorable to the moving party.

III. IT IS LEGAL ERROR TO BASE SUMMARY JUDGMENT ON CONFLICTING AFFIDAVITS FROM THE SAME WITNESS

In the courts below, the issue of prescription turned on when the limitations period began. There was absolutely no evidence that Hawthorne Land had the requisite prior knowledge that would justify the prescription defense raised by Occidental and Texas Brine. Faced with this dearth of knowledge of the part of Hawthorne Land about its claim, the Fifth Circuit sought to conflate the identities of Hawthorne Land and Hawthorne Trust, imputing knowledge of the employees of the trustee of Hawthorne Trust to Hawthorne Land, a wholly separate entity. The Fifth Circuit stated:

> Plaintiffs concede that Clifford LeBlanc, property manager for Hawthorne trust, knew that the pipeline was replaced and told Hawthorne Land about its replacement. Although plaintiffs argue that LeBlanc and Hawthorne Land never knew about the leaks at issue, at the very least they

> should have known that the pipeline was replaced for a reason – brine leaks caused by erosion.
>
> App. 1, 431 F.3d at 229

The only evidence cited by the Fifth Circuit to support Hawthorne Land's purported knowledge of the "leaks at issue" is the first LeBlanc affidavit and a document authored by LeBlanc, a contracted manager of *Hawthorne Trust* – not Hawthorne Land. The Fifth Circuit acknowledges that LeBlanc's second affidavit states that the leaks referred to in his first affidavit "were not the leaks at issue here." App. 1, 431 F.3d at 230, fn. 25. The document authored by LeBlanc merely notes that the pipeline had been replaced. Thus, in order to affirm the dismissal of the claims of Hawthorne Land, the Fifth Circuit was forced to: (1) impute to Hawthorne Land the knowledge of Hawthorne Trust, a completely separate entity coincidently bearing the same first name; (2) improperly infer that Hawthorne Trust's knowledge of replacement of the pipeline constitutes knowledge of the leaks at issue; and (3) ignore completely the conflicts between the first and second LeBlanc affidavits.

Like the district court, the Fifth Circuit refused to "decide whether the second affidavits [of LeBlanc and Scott] should be considered because we affirm [the district court's] judgment that even if they are considered, summary judgment for the defendants is proper." App. 1, 431 F.3d at 228, fn. 20. The first and second LeBlanc affidavits, however, do not tell a consistent tale. The Fifth Circuit's decision to dismiss Hawthorne Land's claim rests entirely on the reliability of the first LeBlanc affidavit. The second LeBlanc affidavit – which is contrary to the first – cannot be ignored without pretending that the requirements of Rule 56 somehow do not apply.

Incredibly, the dismissal of Hawthorne Trust was achieved by applying the same logic. The dismissal of the claims of Hawthorne Trust rests entirely on the first affidavit evidence of Peggy Scott, an employee of the bank trustee of Hawthorne Trust. However, in her second affidavit, Scott states that her first affidavit was intended to refer only to knowledge of alleged brine spills that occurred when the pipeline was being replaced. Such leaks are not at issue in this case. Scott's second affidavit states:

> When I signed the affidavit of August 28, 2003, I did not distinguish between spillage that occurred as a result of the replacement of the section of line by Woodson Construction and independent brine leaks. I am unaware of any independent brine leak that occurred on the Texas Brine pipeline.

As with the dueling LeBlanc affidavits, the issue of the conflicting Scott affidavits cannot be avoided without pretending that this is not a summary judgment proceeding.

Both the district court and the Fifth Circuit refused to resolve the issue of admissibility of the Scott and LeBlanc second affidavits. These affidavits were the elephants in the room that both courts struggled mightily to ignore. FRCP 56(e) states that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." The second affidavits of Scott and LeBlanc clarify their first affidavits. The second affidavits of LeBlanc and Scott were filed in the record prior to the decision on summary judgment. Summary judgment cannot be affirmed without dealing with the conflicts between the first and second affidavits. Both second affidavits of LeBlanc and Scott state that their

original affidavits *did not* refer to the leaks at issue.[2] In determining whether to grant a motion for summary judgment, a federal court cannot pick and choose the affidavit testimony it will believe, especially when such affidavit testimony is elicited solely from affiants who effectively contradict or clarify original affidavits with later affidavits.

It is well established that a "district court must consider all the evidence before it; summary judgment can be entered only *if everything in the record* pleadings, depositions, interrogatories, affidavits, etc., demonstrates that no genuine issue of material fact exists." *Kennett-Murray Corp. v. Bone,* 622 F.2d 887, 892 (5th Cir. 1980), quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) (emphasis added). It is established law that in "determining whether a material issue of fact exists, an affidavit may not be disregarded because it conflicts with the affiant's prior sworn statements." *Franks v. Nimmo,* 796 F.2d 1230, 1237 (10th Cir. 1986). The Fifth Circuit has held that "[a]lthough federal courts often grant summary judgment because a statute of limitations has expired, they '*refuse to grant summary judgment for defendant if there is an issue of fact as to when the limitations period began . . .* " *Terrebonne Parish School Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310-311 (5th Cir. 2002), at 319, citing Wright & Miller, 10 B Federal Practice and Procedure § 2734 (West

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[2] Scott stated in her second affidavit that she was unaware of any leaks other than those spills that occurred when the pipeline was replaced. This case is *not* about those leaks. In his second affidavit, LeBlanc stated that the *only* damages he knew about during his agency relationship were those "sustained on the Hawthorne property as a result of Texas Brine's installing a valve site(s)" and an oily substance pumped into a crawfish pond.

1998) (emphasis added). In granting summary judgment, the Fifth Circuit committed legal error.

CONCLUSION

Nire is an indispensable and necessary party to this action. The district court abused its discretion in failing to allow joinder of Nire, and the Fifth Circuit committed error in failing to reverse this decision. Summary judgment based on prescription should not have been affirmed. The affidavits offered in support of the motion for summary judgment were contradicted by counter affidavits from the same affiants. The district court abused its discretion under FRCP Rule 56(e) in failing to consider the second affidavits of LeBlanc and Scott.

This court should grant writs of certiorari. The decision of the Fifth Circuit should be summarily reversed by this Court, and the case should be remanded for further proceedings.

Respectfully submitted,

VICTOR L. MARCELLO
Counsel of Record
TALBOT, CARMOUCHE & MARCELLO
214 W. Cornerview
P.O. Box 759
Gonzales, LA 70707-0759
Telephone: 225-644-7777
Fax: 225-644-5226
Attorney for Petitioners, Hawthorne Land Company; Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A.

APPENDIX

431 F.3d 221

United States Court of Appeals,Fifth Circuit.

HAWTHORNE LAND COMPANY; Hugh A. **Hawthorne** Family Class Trust, Bank One Trust Company, NA, Plaintiffs-Appellants,

v.

OCCIDENTAL CHEMICAL CORPORATION; et al., Defendants,

Occidental Chemical Corporation; Texas Brine Company, LLC, Successor in Interest to Texas Brine Corporation; Paul Lane, d/b/a Paul Lane's Construction Company; Marsh Buggage Equipment Company; Woodson Construction Company; Tassin International Limited, Defendants-Appellees.

No. 04-30137.

Nov. 15, 2005.

Rehearing Denied Jan. 26, 2006.

Victor L. Marcello, Donald T. Carmouche, John H. Carmouche, Talbot, Carmouche & Marcello, Gonzales, LA, for Plaintiffs-Appellants.

René Andrew Curry, Jr., Terese M. Bennett, Christopher C. Friend, Curry & Friend, New Orleans, LA, for Occidental Chemical Corp. and Texas Brine Co., LLC.

Amy Collier Lambert, Robert N. Markle, Adams & Reese, Baton Rouge, LA, for Tassin Intern. Ltd.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, HIGGINBOTHAM and GARZA, Circuit Judges.

PER CURIAM:

Plaintiffs appeal orders of the district court denying remand and joinder of a party and an order granting summary judgment for defendants. We affirm.

I

In 1965, Hugh Hawthorne purchased a tract of land in St. James Parish, Louisiana. Soon after buying the land, Hawthorne conveyed a servitude to defendant Texas Brine so that it could construct, operate, and maintain a pipeline (called the Oxy-Taft pipeline) on the property. The pipeline is currently operated by Texas Brine and owned by defendant Occidental pursuant to an operating agreement between the two. It is used to transport highly concentrated sodium chloride solution, or brine.

Through various transactions in 1986 and 1987, Hawthorne Land Company ("Hawthorne Land"), Hawthorne Trust (Bank One Trust Company as trustee), and Nire, Inc. acquired ownership in the land, with Nire owning a 5% undivided interest. From 1985 to 1987, the pipeline experienced seven leaks on the property which resulted in the discharge of significant amounts of brine. Occidental hired independent contractors to weld repairs for some of the leaks. Some of the welds were allegedly performed improperly and the leaks continued.

A subsequent site assessment by the plaintiffs' experts showed that the brine had migrated both vertically and horizontally through the ground water, requiring extensive remediation. The pipeline was replaced in 1988.

In February of 2001, plaintiff Hawthorne Land, a Louisiana corporation, sued eight defendants in state court under tort and contract theories for property damage

arising from the leaks. When the suit was filed, six of the eight original defendants were Louisiana citizens. Occidental and Texas Brine (the two non-Louisiana defendants) timely removed to federal court, claiming diversity jurisdiction existed because the non-diverse defendants were improperly joined. They also alleged bankruptcy jurisdiction because one defendant, Woodson Construction Company, had filed for bankruptcy. They answered the complaint with various defenses, including the failure of Hawthorne Land to join all co-owners of its property as plaintiffs.

Hawthorne Land dismissed the alleged bankrupt defendant, filed a motion for leave to amend its complaint to join co-owner Hawthorne Trust as co-plaintiff, and filed a motion to remand. The court granted leave to Hawthorne Land to amend its complaint. Both Occidental and Texas Brine filed oppositions to the motion to remand, and the motion was denied.

Almost a year later, plaintiffs moved to join Nire, Inc., the third co-owner of the land, as a defendant. The district court denied the motion, noting that Nire had recently settled its potential claims with defendants. Plaintiffs moved to join Nire as a defendant, which the district court denied for the same reasons as its denial of the first motion to join Nire.

After extensive discovery, defendants filed a motion for summary judgment on the basis of prescription, and the motion was granted.

II

Plaintiffs first contend that the district court erred in refusing to remand the case to state court. They argue

that two of the in-state defendants – the welders Cain's Hydrostatic Tester, Inc. ("Cain's") and Diamond Fabricators, Inc. ("Diamond") – were properly joined because they performed inadequate welds on the pipeline which later leaked, exposing them to liability. We review the denial of the motion to remand *de novo*.[1]

Joinder is improper if "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant," so that a plaintiff must be able to survive a hypothetical Rule 12(b)(6) challenge to the claim to effect remand.[2] The summary inquiry into facts "is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant."[3] Plaintiffs cannot survive such a challenge here.

First, plaintiffs' petition does not state that Cain's and Diamond were welders; it states, improperly, that they were excavators. Plaintiffs appear to concede this. Moreover, the paragraph in the petition mentioning Cain's and Diamond states that their actions "did not result in the discharge of [brine]." Plaintiffs appear to concede this as well. The petition does not state a claim against Cain's and Diamond.

Second, even if we were to construe the petition liberally to allege negligent welding by Cain's and Diamond, a summary inquiry into the facts reveals that such claims could not survive a motion to dismiss. As defendants point

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[1] *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 295 (5th Cir.1999).

[2] *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir.2004) (en banc).

[3] *Id.*

out, without rebuttal by plaintiffs, there is no documentary connection between Cain's and Diamond and the failed welds. The petition does not allege any connection, and the defendants convincingly show that the leak reports relied upon by plaintiffs in the motion to remand do not reveal a connection, either. In addition, the defendants offered the affidavit of Jim Kleinpeter, a plant manager at Texas Brine, which stated that none of the welds by Cain's or Diamond failed; this affidavit may be "selfserving [sic]," as plaintiffs contend, but it is evidence which plaintiffs have not contradicted on even a superficial level.

Because there was no reasonable basis for the district court to predict that plaintiffs could recover against Cain's and Diamond, its denial of the motion to remand was proper.

III

Plaintiffs next contend that the district court erred in not allowing the joinder of Nire, a co-owner of the land and non-diverse party which, if joined as a defendant, would have destroyed diversity jurisdiction. We review this conclusion for abuse of discretion.[4]

When Occidental and Texas Brine answered Hawthorne Land's petition, they raised as a defense Hawthorne Land's failure to join all of the co-owners of the land. Plaintiffs claim that Hawthorne Land then contacted both Hawthorne Trust and Nire, but that Nire refused to

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[4] *Quintanilla v. Tex. Television, Inc.*, 139 F.3d 494, 499 (5th Cir.1998).

join as a plaintiff. Hawthorne Land was granted leave to amend its complaint to join co-owner Hawthorne Trust.

Six months later – almost a year after Hawthorne Land filed the petition – plaintiffs filed a second proposed amended complaint, seeking to join Nire as a defendant or involuntary plaintiff[5] and apparently arguing that Nire was a necessary party under Federal Rule of Civil Procedure 19.[6] Plaintiffs stated that during those six months they "exhaust[ed] their efforts to convince Nire to join [the case]." Defendants objected to the second proposed amended complaint because they had settled with Nire for $40,000 not long after the second proposed amended complaint was filed, arguing that joinder was no longer required. The settlement released the defendants from all liability and required Nire to cooperate in the defendants' efforts against plaintiffs. Defendants also argued that, if joinder were required, Nire be joined as a plaintiff. Plaintiffs argued in reply that Nire should be joined as a defendant because it might be liable to them for contribution and its contribution might be larger than the proceeds it received in the settlement. The magistrate judge denied the motion and the district court denied review of that order.

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[5] It is not clear from the motion whether the Hawthornes wanted Nire joined as an involuntary plaintiff or defendant.

[6] It is not clear from the motion that plaintiffs were arguing necessity under Rule 19 because they never cited the rule. (The actual motion for leave to amend was filed under Rule 15(a)). And it is not clear from the district court's order denying the motion that it considered the plaintiffs to be arguing necessity under Rule 19. But we are persuaded that the Rule 15(a) motion to amend was based on alleged necessity under Rule 19, as the parties assume on appeal, and that the district court considered it as such.

Later, plaintiffs filed a third motion for leave to amend to add as defendants various owners of adjacent land, defendants who would have defeated diversity. Plaintiffs alleged that brine from defendants' pipeline leaked onto the property of these landowners and later migrated to plaintiffs' property. Plaintiffs do not appeal this order.

Finally, plaintiffs filed a fourth motion[7] for leave to amend to add Nire as a defendant. Although the underlying facts were the same as that for the second motion, plaintiffs relied on a new theory – that Nire "aligned" itself with the defendants because the settlement required it to assist the defendants in their case against plaintiffs. Specifically, plaintiffs argued that the settlement was an unfair attempt to "manipulate" evidence because, after plaintiffs' environmental analysis found excavation necessary, the defendants argued that Louisiana law forbade plaintiffs to excavate without Nire's consent. Plaintiffs argued that, had the lack of Nire's consent caused an inadequate award at trial, they could have held Nire liable under Louisiana law which holds one co-owner liable to the other for damages caused to the common property, including damages from juridical acts. The court denied the motion.

The district court did not abuse its discretion in denying the second motion to amend. The court held that Nire was not a necessary party under Rule 19[8] because it

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[7] Plaintiffs in their brief do not distinguish between the second and fourth motions, but they are different and entail different analyses.

[8] A party is necessary under Rule 19(a) if: "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the

(Continued on following page)

had settled with defendants and could not affect any potential recovery by plaintiffs, which was and remained 95% of the total damages. It rejected as speculative and premature plaintiffs' argument that they could sue Nire if it refused to contribute for costs to analyze or repair the land and that they could presently seek declaratory relief against Nire to establish its obligations to plaintiffs. Plaintiffs have not explained why these conclusions were improper. Nire's presence in the suit could not affect plaintiffs' recovery from defendants; furthermore, there is no evidence that Nire has any intention of not contributing to costs related to the land if need be.[9] It may be true that plaintiffs had a currently viable declaratory relief claim against Nire,[10] but such a claim so tangential to the main issue in the case is insufficient to make a party necessary

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action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

[9] Plaintiffs argue that Nire's presence would be needed somehow if its share of the final costs exceeded the amount it received in settlement. However, even if its share was *less* than the amount it received in settlement, Nire currently possesses the settlement money and would have to contribute it towards the reclamation. Thus, the possibility of Nire not contributing exists regardless of the settlement amount.

[10] For this proposition, plaintiffs cite *Miller v. Seven C's Properties, LLC*, 800 So.2d 406, 408-11 (La.App.2001). Defendants argue that *Miller* is distinguishable because in that case the plaintiff brought a declaratory judgment action against his co-owner seeking contribution for repairs, and, after the co-owner denied the necessity of the repairs, the court found a sufficiently justiciable controversy to proceed. Here, the defendants argue, Nire does not deny the necessity of the proposed repairs and has not refused to contribute any repairs. We do not decide this issue.

under Rule 19. The district court did not abuse its discretion in concluding that Nire was not a necessary party to the litigation.

Plaintiffs argue that even if Nire was not a necessary party, the court should have granted its motion under *Hensgens v. Deere & Co.*[11] This court in *Hensgens* held that "the district court, when confronted with an amendment to add a nondiverse nonindispensable party, should use its discretion in deciding whether to allow that party to be added."[12] It articulated four factors to consider when exercising this discretion: 1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; 2) whether the plaintiff has been dilatory in asking for an amendment; 3) whether the plaintiff will be significantly injured if the amendment is not allowed; and 4) any other factors bearing on the equities.[13]

We cannot hold that the district court's analysis of these factors was an abuse of discretion. As the court held,[14] the manifest purpose of plaintiffs' actions was to defeat federal jurisdiction, the federal forum could provide

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[11] 833 F.2d 1179, 1182 (5th Cir.1987).

[12] *Id.*

[13] *Id.*

[14] The court did not analyze the *Hensgens* factors in ruling on the second motion to amend, only the fourth motion to amend. Nonetheless, the parties on appeal argue the *Hensgens* factors in relation to the second motion to amend – at least insofar as far as they distinguish the two motions, which they often do not. In addition, the two motions are similar in nature, and the *Hensgens* factors are more properly applied to the second motion because the fourth motion, as explained later, is analyzed under a stricter standard since it was filed after a scheduling deadline. Thus, we analyze the *Hensgens* factors as applied to the second motion.

complete relief to the parties, and, years after the petition was originally filed, the equities favored federal resolution of the case.

In addition, the district court did not abuse its discretion in denying the fourth motion to amend. Under *S&W Enterprises, L.L.C. v. Southtrust Bank of Alabama, NA*, Rule 16(b) governs the amendment of pleadings after a deadline in a scheduling order has expired: "Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."[15] Courts should consider four factors: 1) the explanation for the failure to move timely for leave to amend; 2) the importance of the amendment; 3) potential prejudice in allowing the amendment; and 4) the availability of a continuance to cure such prejudice.[16]

In denying the motion, the district court recited its ruling on the second motion and stated that the *S&W Enterprises* factors favored denial here: the "second attempt to add Nire is based on the same key fact, the settlement agreement, and the same fundamental principles of co-ownership. . . . The plaintiffs have not demonstrated why this legal theory was not available [during the second motion] or why it could not have been anticipated at that time. . . . An analysis of the [*S&W Enterprises*] factors reveals that the plaintiffs have not demonstrated good cause for filing their amended complaint."

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[15] 315 F.3d 533, 536 (5th Cir.2003).

[16] *Id.*

Plaintiffs do not explain why this was an abuse of discretion. Their only new argument on appeal seems to be that they did not foresee the defendants' alleged "manipulation" of evidence using the settlement agreement. Plaintiffs do not explain why they could not have foreseen this alleged manipulation[17] and made this argument initially. Moreover, plaintiffs do not address the district court's finding of obvious prejudice to defendants (a change of venue) and the inability of a continuance to cure that prejudice.

For these reasons, the district court did not abuse its discretion in denying plaintiffs' two attempts to join Nire.

IV

Plaintiffs next challenge the district court's grant of summary judgment for defendants following its conclusion that all of their claims were prescribed and that the doctrines of *contra non valentem* and continuous tort did not apply.

Plaintiffs brought claims of tortious damage to land and breach of contract. In Louisiana, the prescriptive period is one year for damage to land and ten years for breach of contract, running from the date of breach.[18] The leaks here occurred between 1985 and 1987, and the suit

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[17] In addition, we do not see how evidence was "manipulated" – the defendants stated merely that "[plaintiffs] have not provided any indication that [Nire] consents to the plaintiffs' proposes (sic) excavation. . . ." Concluding from this statement that defendants "bought" Nire's aid, resulting in plaintiffs' ability to sue Nire, is speculation.

[18] La.Rev.Stat. Ann. art. 3492-93 (West 2005) (damage to land); *id.* art. 3499 (breach of contract).

was filed in 2001. Because the acts complained of occurred more than ten years ago, plaintiffs relied on the *contra non valentem* exception, which states that the period for any claim runs from when the plaintiff knew or should have known of the damage or breach.[19] Plaintiffs claimed that they had no actual or constructive knowledge of the leaks until October 24, 2000, less than a year before they filed suit. The district court disagreed, finding that they knew or should have known of the leaks by late 1988 or early 1989.[20] It also found that there was no continuous tort because there was no evidence of unlawful acts by defendants after 1987. We review *de novo*.[21]

Regarding actual or constructive knowledge, the record is replete with references to pipeline leaks on the Hawthorne property in various letters, affidavits, and depositions. These references were made by multiple people who worked for Hawthorne Land and Hawthorne Trust or who were familiar with the Hawthorne property. On appeal, plaintiffs make two arguments: that these references were to unrelated brine spills resulting from the installation of two valve sites and replacement of the pipeline in 1988, and that the district court erroneously

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[19] *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 743 (5th Cir.2000).

[20] Plaintiffs argue on appeal that the district court should have considered affidavits by two witnesses "clarifying" their earlier affidavits and denied a motion to strike those later affidavits. Defendants disagree. The district court held that, "[r]egardless of the admissibility of the second affidavits," summary judgment should be granted. Like the district court, we do not decide whether the affidavits should be considered because we affirm that court's judgment that even if they are considered, summary judgment for the defendants is proper.

[21] *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 295 (5th Cir.1999).

lumped Hawthorne Land and Hawthorne Trust together, imputing each's knowledge to the other.

There is no genuine issue of material fact that, at a minimum, plaintiffs should have known of the leaks at issue. Even if plaintiffs are correct that most of the references to "leaks" pertained to leaks resulting from installation of the valves and replacement of the pipeline, plaintiffs still should have known why the pipeline was replaced – because it had the leaks at issue.

Taylor Caffery, a lawyer employed by Nire,[22] wrote in a letter that he had "positive testimony of one eyewitness who says that a great deal of brine had been spilled when [Texas Brine] [was] changing the pipe that became *full of holes because of brine erosion* (emphasis added)." In that same letter, Caffery stated that he told Peggy Scott, a representative of Hawthorne Trust, about the alleged leak during the pipeline replacement. And in another letter, that Scott received, Caffery wrote:

> [T]he changing of the pipes was necessitated because brine had corroded the pipe and was leaking out of it. . . .[23]

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[22] Caffery previously had worked for Hawthorne Land and Hawthorne Trust, and it is highly likely that he was in contact with both during this period. But, for purposes of appeal, we construe the facts favorably to plaintiffs and consider him to have been employed only by Nire.

[23] Caffery also prepared an affidavit, signed by a former Texas Brine employee in 1989, stating the following:

> [T]here are lots of leaks in the pipeline going through the Hawthorne property in St. James Parish. I think we found around twenty holes in the pipe. We would find a leak by seeing dead trees around it and knew what had happened. The brine had escaped into the area and killed the trees and we would go and repair that

(Continued on following page)

Scott, and thus Hawthorne Trust, were or should have been aware that the pipeline was being replaced, and that it was being replaced because it had eroded and was leaking.[24]

Furthermore, Hawthorne Land should have known why the pipeline on its land was replaced. Plaintiffs argue that Hawthorne Trust's knowledge cannot be imputed to Hawthorne Land. No such imputation is necessary. Plaintiffs concede that Clifford LeBlanc, property manager for Hawthorne Trust, knew that the pipeline was replaced and told Hawthorne Land about its replacement. Although plaintiffs argue that LeBlanc and Hawthorne Land never knew about the leaks at issue,[25] at the very least they

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section of the pipe. The leaks must have occurred over a period of four or five years. . . . The acreage where the biggest spill occurred is where the pipeline was replaced.

[24] We recognize that Scott seems to state in her second affidavit that the only leaks she was aware of were those relating to the pipeline replacement. In light of the information she received from Caffery that the pipeline was being replaced because it was being eroded, at the very least she *should* have known of the leaks at issue here. Her second affidavit is insufficient to cast doubt on that conclusion.

[25] Plaintiffs contend that Texas Brine told LeBlanc it needed to perform routine "maintenance" on the pipeline, which is why LeBlanc stated in a letter to Hawthorne Land that the pipeline was "faulty" while informing it of the arrangements for that maintenance. They argue that instead of performing maintenance on the pipeline, Texas Brine replaced it, which LeBlanc and plaintiffs discovered shortly thereafter. Thus, they argue, LeBlanc's reference to the pipeline being "faulty" did not refer to the leaks at issue. Defendants assert that LeBlanc stated that he learned of a number of leaks on the property from Lawrence Ordoyne, a neighbor, that he personally observed those leaks, and that he discussed them with Scott, Caffery, and Hawthorne Land. Plaintiffs counter by pointing to LeBlanc's second affidavit, in which he stated that those leaks were not the leaks at issue here.

should have known that the pipeline was replaced for a reason – brine leaks caused by erosion.

Thus, we agree with the district court's conclusion that plaintiffs knew or should have known of the leaks at issue by late 1988 or early 1989. We also reject plaintiffs' argument that the prescriptive period should be tolled because defendants intentionally hid knowledge of the leaks at issue;[26] there is insufficient evidence to support this claim.

Finally, we agree with the district court that the continuous tort doctrine does not apply. For that doctrine to apply, the conduct, and not just the damage, must be continuous.[27] Their argument that the brine itself has continually trespassed on the land is foreclosed by this court's opinion in the perfectly analogous case of *Boudreaux v. Jefferson Island Storage & Hub*.[28]

V

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[26] *Corsey v. Louisiana*, 375 So.2d 1319, 1319-21 (La.1979) (describing the doctrine that the prescriptive period does not run where the defendants intentionally hide knowledge from the plaintiffs or otherwise impede their ability to file suit).

[27] *Boudreaux v. Jefferson Island Storage & Hub*, 255 F.3d 271, 273-74 (5th Cir.2001).

[28] *Id.* (holding that the continued presence of saltwater under a landowner's property was not a continuing tort for prescriptive purposes).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HAWTHORNE LAND COMPANY	
VERSUS	CIVIL ACTION NO. 01-0881 c/w 03-2435
OCCIDENTAL CHEMICAL CORPORATION, TEXAS BRINE CORPORATION, ET. AL.	SECTION M

ORDER

(Filed Jan. 6, 2004)

Before the Court are the following Motions:

1. Defendants' Motion for Summary Judgment Based on Prescription (rec. doc. #247) and Defendants' Motion to Strike and/or Exclude Affidavits Filed By Plaintiff From Consideration By the Court in Connection with Defendants' Motion for Summary Judgment Based on Prescription (rec. doc.# 291), which came for hearing with oral argument on October 29, 2003.

2. Plaintiff's Motion to De-consolidate and Retransfer (rec. doc.#359), Defendant's Motion to Sever Trials (rec. doc. #323), Plaintiff's Motion to Remand (rec. doc. #262), and Plaintiff's Motion for Review and Appeal of Magistrate's Denial of Plaintiff's Opposition to Defendants' Motion to Quash Depositions of Clifford LeBlanc and Peggy Scott or in the alternative, Motion for Protective Order, (rec. doc. #369) which came for hearing, with oral argument, on December 17, 2003.

3. Additional Motions in the case which came for hearing on October 29, 2003. (rec. docs.#256, 233, 235, 237, 239, 241, 245, 248, 250, 252, 254, 231, 243)

After consideration of all of these Motions, the arguments by counsel, and the applicable law, the Court GRANTS the Defendants' Motion for Summary Judgment Based on Prescription (#247) and GRANTS Plaintiff's Motion to De-consolidate and Retransfer Civil Action No. 03-2435 (#359). Plaintiff's Motion to Remand (#262) is DENIED at this time to be re-urged upon transfer of the case. The remaining Motions in the case are DENIED as MOOT.

FACTS

Plaintiffs are Hawthorne Land Company (HLC) and the Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Trustee, (Trust). They own 46.34% and 48.66% undivided interest respectively in approximately 17,350 acres in rural St. James and Assumption Parishes, south of Donaldsonville, Louisiana.

The property consists of marsh and low lying woodlands that are frequently flooded. Enterprises on the property include several hunting clubs, crawfish production, alligator harvest, timber management, sugar cane production and oil and gas exploration. The property is the only asset of the company.

Plaintiffs filed suit against Texas Brine Company, LLC (Texas Brine) and Occidental Chemical Corporation (Occidental) in 2001. Plaintiffs seek recovery in tort and

under contract[1] for damages to their property arising out of leaks from a brine pipeline owned by Occidental and operated by Texas Brine. The leaks occurred between April, 1985, and November, 1987. In 1988, Occidental replaced the pipeline.

Defendants moved for Summary Judgment alleging that Plaintiffs' action is prescribed because suit was not filed for thirteen years after the brine leaks occurred. Plaintiffs contend that they had no knowledge of their cause of action until October 24, 2000.

LAW AND ANALYSIS

Under Louisiana Civil Code Art. 3493, in cases of damage to immovable property, the one year prescriptive period commences to run from the day the owner of the immovable acquired or should have acquired knowledge of the damage. An action on a contract is governed by the prescriptive period of ten years for personal actions. La. Civ. Code Art. 3499.

In the decade before this suit was filed, HLC and the Trust were managed by a series of professionals: Peggy K. Scott, Vice President, Trust Officer, and Trust Administrator beginning in 1985; John Cannizaro, real estate manager beginning in 1989; Christian Fatzer, Jr., manager for oil and gas properties and real estate beginning in 1994; and Clifford G. LeBlanc, supervisory management agent or property manager, hired by the Trust in February, 1987.

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[1] It is apparent from statements by Plaintiff's counsel during oral argument on December 17, 2003, that they consider their alleged damages arise in tort.

It was their duty to assess the risks of the various enterprises and inspect the property for situations where further action or more intensive *investigation was required*.

Taylor Caffery, an attorney in New Orleans, was retained during 1987 and 1988 to advise HLC regarding the pipeline leaks. There is correspondence dated December 12, 1988, between Caffery and B. Dan Hall, Texas Brine's Land and Right of Way Manager, regarding the leaks and the environmental impact. Caffery's letter said, "It is my understanding that the brine spill was sufficiently severe that nothing will grow in that area again, unless and until considerable remedial work is done with the soil." On January 19, 1989, Caffery again wrote Hall at Texas Brine saying, "I have positive testimony of one eyewitness who says that a great deal of brine had been spilled when you were changing the pipe that became full of holes because of brine erosion. He said that it was of sufficient quantity that nothing would ever grow there again without remedial work on the soil. . . . In fact, I have spoken with Peggy Scott of the First National Bank of Commerce . . . ".

There is ample evidence of actual knowledge of the leaks, certainly constructive knowledge of the leaks, by late 1988 or early 1989. Regardless of the admissibility of the second affidavits from Scott and LeBlanc, their constructive, knowledge of the leaks is indisputable. Postponement by HLC and the Trust to file suit against the defendants for twelve years constitutes inexcusable delay under both the tort and contractual theories of this case.

Plaintiffs argue that prescription was interrupted under the doctrines of continuous tort and contra non

valentem. Both of these doctrines are inapplicable. There is no evidence of continued unlawful acts by the Defendants. Continuing damage is not sufficient to create a continuous tort. *See Terrebonne Parish School Board v. Mobil Oil Corp.* 310 F.3d 870 (5th Cir. 2002). Contra non valentem does not suspend prescription when a litigant, as in this case, is perfectly able to bring its claim, but fails or refuses to do so. *Id.*

Accordingly, for the reasons stated above, Defendants' Motion for Summary Judgement Based upon Prescription is GRANTED. Counsel for Defendant is requested to submit a judgment consistent with this ORDER, all parties to bear their own costs.

New Orleans, Louisiana, this 6th day of January, 2004.

/s/ Peter Beer
Peter Beer
United States
District Judge

MINUTE ENTRY
SHUSHAN, M.J.
DECEMBER 5, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HAWTHORNE LAND COMPANY	CIVIL ACTION NO.
VERSUS	NUMBER 01-0881
OCCIDENTAL CHEMICAL CORPORATION, ET. AL.	SECTION "M" (1)

HEARING ON MOTION

(Filed Dec. 8, 2003)

APPEARANCES: Submitted on briefs

MOTIONS: PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH SUPPLEMENTAL AND AMENDED COMPLAINT (Rec. doc. 334)

DENIED

Before the undersigned is the motion by the plaintiffs, Hawthorne Land Company and Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Trustee, for leave to file fourth amended and supplemental complaint. The plaintiffs seek to add Nire, Inc. ("Nire") as an additional defendant. The defendants, Occidental Chemical Corporation and Texas Brine Company, L.L.C., oppose the motion.

PROCEDURAL BACKGROUND

On April 3, 2001, the defendants removed this action to federal court from the 23rd Judicial District Court for

the Parish of St. James, State of Louisiana. Rec. doc. 1. On June 13, 2001, the plaintiffs filed a first supplemental and amending complaint adding Hugh Hawthorne as a plaintiff. Rec. doc. 11. The plaintiffs' motion to remand was denied on August 22, 2001. Rec. doc. 20. On December 4, 2001, the plaintiffs sought the consent of the defendants to the filing of a second supplemental and amending petition. Rec. doc. 28, exhibit A. The defendants objected, and on February 8, 2002, the plaintiffs filed for leave to do so. Rec. doc. 32. The plaintiffs, who owned 95% of the land at issue, sought leave to add Nire, who owned the remaining 5%, as a *defendant.* This would destroy diversity jurisdiction. One of the defendants sought discovery. The parties filed additional memoranda, and the motion was submitted in May, 2002, more than a year after the filing of the petition in state court.

On May 24, 2002, the undersigned denied the motion to add Nire as a defendant. Rec. doc. 67. On June 6, 2002, there was a preliminary conference and a scheduling order was entered, including the requirement that amendments to pleadings be filed no later than July 8, 2002. Rec. doc. 70. The trial was fixed for May 12, 2003. On July 1, 2002, the plaintiffs filed an unopposed motion to extend the deadline to amend pleadings for thirty days. Rec. doc. 76. The plaintiffs also sought review of the order denying them leave to amend to add Nire. Rec. doc. 69. On July 17, 2002, the District Court denied this motion. Rec. doc. 80.

On January 24, 2003, there was a discovery/status conference, and the trial was reset for August 11, 2003. Rec. doc. 104. Certain deadlines in the June 6, 2002 scheduling order were adjusted, but there was no adjustment to the deadline for amending pleadings. *Id.* There was a further discovery/status conference on April 10,

2003, where dates were set for depositions and the completion of discovery. Rec. doc. 118. The trial date was not changed and there was no extension to the time to amend pleadings. *Id.* On May 12, 2003, there was a further discovery/status conference to resolve discovery issues and to continue the trial to either October 23 or November 3, 2003. Rec. doc. 134. On May 22, 2003, the trial was fixed for November 3, 2003. Rec. doc. 142. New dates were set for completion of discovery and the filing of dispositive motions, but there was no extension of the deadline to amend pleadings. *Id.*

On June 23, 2003, the plaintiffs filed a motion for leave to amend to add as defendants, the owners of land adjacent to their property. Rec. doc. 180. Many of these persons were residents of Louisiana, so the effect of the amendment would have been to destroy diversity jurisdiction. The plaintiffs alleged that the defendants' pipeline leaked on the property of the adjacent landowners and the brine from those leaks had migrated onto the plaintiffs' property. *Id.* On August 8, 2003, the District Court denied plaintiffs' motion to amend. Rec. doc. 193.

On October 17, 2003, the plaintiffs filed an unopposed motion to continue the trial from November 3, 2003 to January 26, 2004. The District Court granted this motion. Rec. doc. 324. The deadlines in the prior scheduling orders were not altered. *Id.*

FED. R. CIV. P. 16(b)

The foregoing demonstrates that the original deadline for amending pleadings was July 8, 2002. Rec. doc. 70. At the request of the plaintiffs this was extended one time by thirty days. Rec. doc. 76. There were no other extensions of

that deadline. In *S&W Enterprises, L.L.C. v. Southtrust Bank of Alabama, NA*, 315 F.3d 533 (5th Cir. 2003), the Fifth Circuit held that Fed. R. Civ. P. 16(b) governs the amendment of pleadings after a deadline in a scheduling order has expired.

> Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave.

Id. at 536. The Fifth Circuit applied a four-part test to determine whether the district court's refusal to modify its scheduling order was an abuse of discretion: (1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice. *Id.* at 536.

At the heart of the controversy over Nire is the issue of jurisdiction. Nire and the defendants settled all claims for the restoration, remediation or clean up of the Hawthorne property. The plaintiffs describe this as "cynical ploy to manipulate the jurisdiction of this Court. . . . " Rec. doc. 334 at p. 2. The plaintiffs contend that in the settlement the defendants sought to purchase Nire's assistance in defeating the plaintiffs' claims. The plaintiffs urge that the effect of the release is that Nire aligned itself with the defendants. In support of their motion to amend, the plaintiffs rely on La. Civ. Code Ann. arts. 799, 801 and 804.

In response to the plaintiffs' first attempt to join Nire as a defendant, the undersigned determined that the plaintiffs' amendment to add Nire would be futile:

> Claudia Hawthorne is the president and sole stockholder of Nire, a Louisiana corporation.

Nire's only real property is the undivided interest in the property located in St. James Parish at issue in this matter. Exhibit 1 to Rec. doc. 64. On April 15, 2002, Nire entered into a settlement agreement with Occidental and Texas Brine (exhibit A to exhibit 1 to Rec. doc. 64), where, for a payment of $40,000 from Occidental and Texas Brine, Nire and Ms. Hawthorne released them from any claims relating to the St. James Parish property for damages to it. Occidental and Texas Brine agreed to indemnify Nire and Ms. Hawthorne and hold them harmless from any future costs associated with any corrective action associated with the St. James Parish property that may be ordered in this litigation.

Texas Brine contends that, because of the settlement, Nire is no longer a necessary and indispensable party. Rec. doc. 63. Occidental argues that the settlement shows that Nire has no interest in this lawsuit. It contends that, pursuant to La. Civ. Code Ann. art. 3071, the settlement is the equivalent of a judgment dismissing all of Nire's claims against Occidental and Texas Brine. It argues that, pursuant to Fed. R. Civ. P. 19(a), Nire's presence in this litigation is neither needed nor desirable. In the alternative, it contends that if Nire is added as a party, it should be realigned as a party plaintiff so as not to destroy diversity. Rec. doc. 64. Hawthorne contends that it has the right to seek relief from Nire for its proportionate share of expenses for any assessment due to the contamination of the property.

Hawthorne's original petition alleges that Occidental and Texas Brine caused damage to its property. Rec. doc. 1. "[I]n order to sue for damages for injury to the land or to sue for partition, all . . . [co-owners] must be before the court in order that

each may claim his share." 7 Wright, Miller and Marcus, Federal Practice and Procedure §1621 (3rd ed. 2001). In the prayer for relief in the proposed second amended and supplemental petition, Hawthorne asks that Nire be joined and required to assert its rights in this action or be precluded thereafter from asserting them. Attachment to Rec. doc. 32. Nire's settlement with Occidental and Texas Brine resolved any claim that Nire may have had for damages for the alleged injury to the property. Hawthorne's ground for requiring Nire's joinder was eliminated by the settlement.

In reply, Hawthorne raises new grounds to attempt to force Nire's joinder as a defendant. Pursuant to La. Civ. Code Ann. arts. 800 and 806, a co-owner that incurred expenses on account of the property is entitled to proportionate reimbursement from other co-owners. Hawthorne argues that: (1) Nire must fund its share of any assessment for the determination of the extent and nature of the alleged contamination of the property; (2) it is entitled to declaratory relief against Nire on its obligation to pay its share of such expenses; and (3) if Nire's share of the cost of remediating the alleged damages exceeds its settlement proceeds, Nire will be required to make up the difference. Hawthorne asserts that the only way it can effect a *complete* remediation of the property is if Nire is present in this litigation. Rec. doc. 65.

The most that Hawthorne can recover from Texas Brine and Occidental under any circumstance is 95% of the damages. There can be no shortfall between its recovery and its share of the damages. Hawthorne seeks to raise an issue that does not exist; namely the anticipated failure of

> Nire to pay its share of any expenses for an assessment for the alleged contamination. Further, there is no allegation that Hawthorne has incurred expense or that Nire refuses to pay its share of incurred expenses. Hawthorn's reliance on Art. 806 is misplaced and it too demonstrates the flaw in Hawthorne's argument.
>
> > A co-owner who on account of the thing held in indivision has *incurred* necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.
>
> La. Civ. Code Ann. art. 806 (emphasis added). Hawthorne has not incurred any expenses so it has no claim for reimbursement from Nire. Hawthorne's amendment to add Nire as a defendant would be futile.

Rec. doc. 67 at pp. 2-5 (emphasis added). This extended quotation from the May 24, 2002 ruling is included to demonstrate that: (1) the plaintiffs were fully apprised of the terms of the Nire settlement long before they filed the instant motion; (2) the plaintiffs considered the impact of the Louisiana Civil Code Articles on the obligations of the co-owners on their first attempt to add Nire as a defendant. The plaintiffs' second attempt to add Nire is based on the same key fact, the settlement agreement, and the same fundamental principles of co-ownership. The second attempt, however, is clothed in a modified legal theory. The plaintiffs have not demonstrated why this legal theory was not available in May, 2002 or why it could not have been anticipated at that time.

The importance of the amendment to the plaintiffs is clear. The addition of Nire defeats diversity jurisdiction. There is potential prejudice in allowing the amendment. Just as the plaintiffs seek resolution of the dispute in state court, the defendants prefer resolution in federal court. The case is now set for trial in January, 2004. The parties have done much work in preparation for that trial. Putting aside the issue of the forum, both sides have an interest in the timely resolution of the dispute. Both parties would be prejudiced by further delay in the resolution of the controversy. A continuance is not available to cure the prejudice. An analysis of the factors cited by *S&W Enterprises* reveals that the plaintiffs have not demonstrated good cause for filing their amended complaint.

FED. R. CIV. P. 15(a)

In *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir. 1998), the Fifth Circuit said:

> The denial of a Rule 15(a) motion to amend is reviewed for abuse of discretion. Likewise, whether to grant such a motion is committed to the sound discretion of the district court, but, that discretion is limited by Rule 15(a), which states that leave shall be given when justice so requires. In sum, the motion should not be denied unless there is a substantial reason to do so.

Id. at 318. This is tempered by the requirement found in *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987), that "the district court, when confronted with an amendment to add a nondiverse nonindispensable party, should use its discretion in deciding whether to allow that party to be added." *See also Doleac v. Michalson*, 264 F 3d 470, 474 (5th Cir. 2001). *Hensgens* identified the following

factors that the district court should consider in balancing the defendants' interests in maintaining the federal forum with the competing interests of not having parallel lawsuits. (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether the plaintiff has been dilatory in asking for an amendment; (3) whether the plaintiff will be significantly injured if the amendment is not allowed; and (4) any other factors bearing on the equities. 833 F.2d at 1182. It is manifest that the purpose of the attempt to add Nire as a defendant is to defeat federal jurisdiction. While the plaintiffs' initial attempt to [add] Nire was not dilatory, the second attempt do so is dilatory for the reasons described above. The federal forum can provide complete relief to the plaintiffs, so they will not be significantly injured if the amendment is not allowed. At this late stage in these proceedings with trial less than two months away, the equities and the interests of all of the parties favor maintenance of the federal forum and the prompt resolution of this controversy.

IT IS ORDERED that the plaintiffs' motion for leave to file fourth amended and supplemental complaint (Rec. doc. 334) is DENIED.

/s/ Sally Shushan
SALLY SHUSHAN
United States Magistrate Judge

MINUTE ENTRY
SHUSHAN, M.J.
MAY 24, 2002

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

HAWTHORNE LAND COMPANY	CIVIL ACTION
VERSUS	NO: 01-0881
OCCIDENTAL CHEMICAL CORPORATION, et al	SECTION: "M"(1)

HEARING ON MOTIONS

(Filed May 24, 2002)

APPEARANCES: Submitted on briefs

MOTION: MOTION FOR LEAVE TO FILE SECOND AMENDED AND SUPPLEMENTAL PETITION (Rec. doc. 32)

DENIED

Before the undersigned is the motion of the plaintiffs, Hawthorne Land Company, Hugh A. Hawthorne Family Class Trust, Bank One Trust Company, N.A., Trustee (collectively referred to as "Hawthorne"), for leave to file a second amended and supplemental petition. Rec. doc. 32.

Hawthorne Land Company filed this action in the 23rd Judicial District Court for the Parish of St. James, State of Louisiana, and it was removed to federal court. Rec. doc. 1. It alleged that the defendants were liable for damages caused by leaks from a pipeline maintained by the defendants on its property. On June 6, 2001, it was granted leave to file a first amended and supplemental

complaint which added Hawthorne Trust as a co-plaintiff. Rec. doc. 11. Hawthorne Land Company then filed a motion to remand (rec. doc. 6), in response to which the defendants argued that the plaintiffs fraudulently joined parties to defeat diversity. Rec. doc. 12. The Court denied the motion for remand. Rec. doc. 20.

Hawthorne owns 95% of the land at issue and Nire, Inc. ("Nire") owns the remaining 5%. Nire was not a co-plaintiff in the action filed by Hawthorne in state court. On February 8, 2002, Hawthorne filed this motion for leave to file a second amended and supplemental petition naming Nire as a defendant: Rec. doc. 32. Hawthorne alleged that: (1) Nire is a co-owner of the property; and (2) all co-owners are necessary and indispensable parties to the action to clean-up the alleged contaminated property but Nire objects to being brought into the suit. Attachment to Rec. doc. 32. One of the defendants, Texas Brine Company, LLC ("Texas Brine"), sought a continuance of the motion to conduct discovery and the matter was set for briefing in May. Rec. doc. 34. Texas Brine and Occidental Chemical Corporation ("Occidental"), a second defendant, filed oppositions to the motion to amend. Rec. does. 63 and 64. Hawthorne filed a reply. Rec. doc. 65.

Whether leave to amend should be granted is entrusted to the sound discretion of the district court, and that court's ruling is reversible only for an abuse of discretion. *Quintanilla v. Texas Television Inc.*, 139 F.3d 494, 499 (5th Cir. 1998). When an amendment would be futile, it is appropriate to deny it. *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991).

Claudia Hawthorne is the president and sole stockholder of Nire, a Louisiana corporation. Nire's only real

property is the undivided interest in the property located in St. James Parish at issue in this matter. Exhibit 1 to Rec. doc. 64. On April 15, 2002, Nire entered into a settlement agreement with Occidental and Texas Brine (exhibit A to exhibit 1 to Rec. doc. 64), where, for a payment of $40,000 from Occidental and Texas Brine, Nire and Ms. Hawthorne released them from any claims relating to the St. James Parish property for damages to it. Occidental and Texas Brine agreed to indemnify Nire and Ms. Hawthorne and hold them harmless from any future costs associated with any corrective action associated with the St. James Parish property that may be ordered in this litigation.

Texas Brine contends that, because of the settlement, Nire is no longer a necessary and indispensable party. Rec. doc. 63. Occidental argues that the settlement shows that Nire has no interest in this lawsuit. It contends that, pursuant to La. Civ. Code Ann. art. 3071, the settlement is the equivalent of a judgment dismissing all of Nire's claims against Occidental and Texas Brine. It argues that, pursuant to Fed. R. Civ. P. 19(a), Nire's presence in this litigation is neither needed nor desirable. In the alternative, it contends that if Nire is added as a party, it should be realigned as a party plaintiff so as not to destroy diversity. Rec. doc. 64. Hawthorne contends that it has the right to seek relief from Nire for its proportionate share of expenses for any assessment due to the contamination of the property.

Hawthorne's original petition alleges that Occidental and Texas Brine caused damage to its property. Rec. doc. 1. "[I]n order to sue for damages for injury to the land or to sue for partition, all . . . [co-owners] must be before the court in order that each may claim his share." 7 Wright,

Miller and Marcus, Federal Practice and Procedure §1621 (3rd ed. 2001). In the prayer for relief in the proposed second amended and supplemental petition, Hawthorne asks that Nire be joined and required to assert its rights in this action or be precluded thereafter from asserting them. Attachment to Rec. doc. 32. Nire's settlement with Occidental and Texas Brine resolved any claim that Nire may have had for damages for the alleged injury to the property. Hawthorne's ground for requiring Nire's joinder was eliminated by the settlement.

In reply, Hawthorne raises new grounds to attempt to force Nire's joinder as a defendant. Pursuant to La. Civ. Code Ann. arts. 800 and 806, a co-owner that incurred expenses on account of the property is entitled to proportionate reimbursement from other co-owners. Hawthorne argues that: (1) Nire must fund its share of any assessment for the determination of the extent and nature of the alleged contamination of the property; (2) it is entitled to declaratory relief against Nire on its obligation to pay its share of such expenses; and (3) if Nire's share of the cost of remediating the alleged damages exceeds its settlement proceeds, Nire will be required to make up the difference. Hawthorne asserts that the only way it can effect a *complete* remediation of the property is if Nire is present in this litigation. Rec. doc. 65.

The most that Hawthorne can recover from Texas Brine and Occidental under any circumstance is 95% of the damages. There can be no shortfall between its recovery and its share of the damages. Hawthorne seeks to raise an issue that does not exist; namely the anticipated failure of Nire to pay its share of any expenses for an assessment for the alleged contamination. Further, there is no allegation that Hawthorne has incurred expense or

that Nire refuses to pay its share of incurred expenses. Hawthorne's reliance on Art. 806 is misplaced and it too demonstrates the flaw in Hawthorne's argument.

> A co-owner who on account of the thing held in indivision has *incurred* necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

La. Civ. Code Ann. art. 806 (emphasis added). Hawthorne has not incurred any expenses so it has no claim for reimbursement from Nire. Hawthorne's amendment to add Nire as a defendant would be futile.

IT IS ORDERED that the motion of the plaintiffs for leave to file second amended and supplemental petition (Rec. doc. 32) is DENIED.

/s/ Sally Shushan
SALLY SHUSHAN
United State Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30137

HAWTHORNE LAND COMPANY; HUGH A HAWTHORNE FAMILY CLASS TRUST, BANK ONE TRUST COMPANY N A

Plaintiffs-Appellants

v.

OCCIDENTAL CHEMICAL CORPORATION; ET AL

Defendants

OCCIDENTAL CHEMICAL CORPORATION; TEXAS BRINE COMPANY, LLC, Successor in Interest to Texas Brine Corporation; PAUL LANE, doing business as Paul Lane's Construction Company; MARSH BUGGAGE EQUIPMENT COMPANY; WOODSON CONSTRUCTION COMPANY; TASSIN INTERNATIONAL LIMITED

Defendants-Appellees

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

(Filed Jan. 26, 2006)

Before REAVLEY, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **denied**.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
United States Circuit Judge